(3) (4)

Nos. 96-552 & 96-553

In The

Supreme Court of the United States

October Term, 1996

RACHEL AGOSTINI, *et al.*,

Petitioners,

-and-

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,

Petitioners,

vs.

BETTY-LOUISE FELTON, *et al.*,

Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is there a compelling reason to grant the writs when there is no real substantive dispute before the Court, when petitioners seek a rehearing of an appeal determined eleven years ago in order to be able to reinstitute a program of remedial instruction and counseling of religous school students in place of the program that has been in operation during the eleven year interim without any effort on their part until now to obtain relief therefrom, and when their only reasons for seeking a rehearing at this time are; (a) a belief that they may be able to obtain a more favorable result; (b) a current unfunded cost of the program in operation that may only be temporary and that they have acknowledged to be relatively minimal; and (c) an alleged inconvenience arising from the fact that the instruction and counseling in the program in operation is provided mainly in classrooms in mobile units immediately outside of the religious school buildings instead of classrooms inside those buildings?

2. Are there grounds in the determination of this Court in the companion case to this case, involving programs the Court found to be "very similar" to the program in question herein, which may serve as additional grounds for upholding the prior determination herein, and in support of which respondents ought to be given the opportunity to develop a more current and adequate record than the eleven-year-old record on appeal herein, if there is to be a rehearing of that appeal?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the United States Court of Appeals for the Second Circuit were the following:

Betty-Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwatz, Robert H. Side and Allen H. Zelon, plaintiffs-appellees-cross-appellants;

Chancellor of the Board of Education of the City of New York and the Board of Education of the City School District of the City of New York, defendants-appellants-cross-appellees;

Rachel Agostini, Maria Cosarca, Digna Duran, Ivette Encarnacion, Maria L. Fernandez, Dolly Cutrera Then, Joseph M. Then, Margaret Figueroa, Michele Gallo, Marie Sejour, Joan Jackson. Cheryl Malcousu, Tonya Stevens and Rosemarie Vasques, defendants-intervenors-appellants-cross-appellees;

Secretary, United States Department of Education, defendant. (The Secretary did not appeal to the Court of Appeals, having declined to join in the motions of the other defendants and the defendants-intervenors in the District Court).

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Respondents, Betty-Louise Felton *et al.*, respectfully submit this brief in opposition to the petitions for a writ of certiorari that seek a rehearing of the prior determination of this Court in this case, *sub. nom., Aguilar v. Felton,* 473 U.S. 402 (1985).

STATEMENT OF THE CASE

A. Preliminary Statement

In *Aguilar,* eleven years ago, this Court held that a program or plan pursuant to which the Chancellor of the Board of Education of the City of New York and the Board of Education of that City provided instruction and counseling, by publicly-employed and paid teachers and counselors, on the premises of schools whose primary, if not only, reason for existence was their religious mission, violated the Establishment Clause of the First Amendment to the Constitution.

Since *Aguilar,* the Board of Education has developed a program, the "Alternative Plan," intended to avoid the aspects of the program invalidated in 1985. The Alternative Plan has withstood challenge in the United States District Court in the Eastern District of New York, and the features of the Plan, incorporated in the programs of other school districts, have withstood challenge in several Courts of Appeal.[1]

Although the Alternative Plan has been in operation for eleven years, petitioners insist that this Court in effect grant a rehearing of their appeal in *Aguilar* which would allow the

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1. *Walker v. San Francisco Unified Sch. Dist.,* 46 F.3d 1449 (9th Cir. 1995); *Board of Education v. Alexander,* 983 F.2d 745 (7th Cir. 1992); *Barnes v. Cavazos,* 966 F.2d 1056 (6th Cir. 1992); *Pulido v. Cavazos,* 934 F.2d 912 (8th Cir. 1991); *Committee for Religious Liberty v. Secretary, United States Dep't of Education,* 88 Civ. 96 (JG) (E.D.N.Y.) (*"PEARL* case") (cross-motion dismissing plaintiffs' complaint granted 10/23/96).

Board of Education to re-institute the program invalidated therein. Their primary, if not only reason for doing so are comments of Justices of this court in *Board of Kiryas Joel School District v. Grumet*, 114 S. Ct. 2481 (1994) expressing dissatisfaction with the determination in *Aguilar* and a desire to reconsider that determination in a proper case. Secondarily, petitioners complain of the alleged financial and administrative burdens they claim are inherent in the Alternative Plan concerning which they sought no relief in any court until the comments in *Kiryas Joel*.

It is respondents' position that the alleged financial burdens of the Alternative Plan are self-imposed, perhaps temporary, and relatively minimal, that the alleged administrative burdens are virtually non-existent, and that, even were it otherwise, such considerations do not furnish a compelling reason for this Court to undertake reconsideration of the weighty constitutional issue or issues previously determined in *Aguilar* at this time and on the existing record.

Petitioners also insist that the sole ground for the prior determination in *Aguilar* was that the monitoring required to prevent the City's teachers and counselors from furthering the religious mission of the schools on the premises of which they performed their services would necessarily be so extreme as to result in "excessive entanglement" of church and state (City Pet., p. 10; Agostini Pet., p. 2.). In this respect, petitioners are not without impressive support in this Court *(see,* 473 U.S. at 426, O'Connor, J., dissenting). They assume, however, that the determination in *Aguilar* must stand or fall on the basis of the doctrine of "excessive entanglement" and virtually ignore in their petitions grounds which may prove to be stronger for allowing the determination in *Aguilar* to stand undisturbed.

Respondents believe that the basis of the determination in

Aguilar was broader than that provided by the doctrine of "excessive entanglement." We do not, however, stress that point. Although we by no means abandon the argument that a program that provides for the regular presence of publicly-employed and paid teachers and counselors on the premises of religious schools is sufficiently calculated, regardless of monitoring, to result in the furthering by the public employees, consciously or unconsciously, of the religious mission of the schools in which they perform their services, we submit that there may be even stronger grounds today, more than ever, for letting the determination in *Aguilar* stand.

Specifically, respondents rely on the determination and reasoning of this Court in *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), the case that was heard and decided at the same time as *Aguilar*, but in which the prevailing taxpayers had the foresight not to rely, as did respondents in *Aguilar*, solely on the doctrine of "excessive entanglement." Suffice it to say here that in *Ball*[2] this Court invalidated two programs instituted by a city school district which in his opinion for the Court in *Aguilar* Justice Brennan described as "very similar" to the program of the city school district in this case (473 U.S. at 409).

B. The Program in Question in *Aguilar*

In their briefs, petitioners emphasize the provisions of Title I which they describe at some length (City Pet., pp. 2-8; Agostini Pet., pp. 3-5). It is important, therefore, to note that respondents did not in this case prior to and including *Aguilar*, challenge the *statute* as violating the Establishment Clause; we challenged

2. Respondents have been accustomed to referring to this case as *"Grand Rapids,"* as we have done in our cross-petition, but we shall refer to it as *"Ball"* herein because it appears to have been referred to as such in many, if not all, of the opinions from which we shall quote.

the original *program* placed in operation by the Chancellor and Board of Education on the premises of religious schools in New York City (hereinafter referred to as the "Original Plan").

The Original Plan differed considerably from the statute. Whereas the statute is general in scope in the sense that it refers to a disadvantaged class of students regardless of their school — *i.e.*, public or "non-public" — the Original Plan, for all practical purposes, covers students attending only one type of "non-public" school, the type which has as its primary, if not its only, reason for existence, a religious mission (hereinafter referred to as a "religious" school). It is an undisputed fact that virtually all of the students attending "non-public" schools who received Title I services under the Original Plan attended religious schools — to be precise, 21,906 out of 21,958, or 99.76% (A41). Of those students, 86% attended Roman Catholic parochial schools, and 8% attended Hebrew Day schools (A93).

Whereas the Title I statute is silent concerning where the statutory services are to be performed, the Original Plan provided that services for students attending participating religious schools were to be performed on the premises of their schools.

Whereas the statute is silent concerning the manner in which the statutory services are initially arranged to be made available to eligible students attending participating religious schools, the Original Plan left such arrangement to the absolute discretion of their schools. Accordingly, the statutory services were made available to the students of a religious school only if the school elected to participate in the Plan. Conversely, those services were not available, even to students eligible and desirous of receiving, or whose parents were desirous of their children receiving, such services if the religious school chose not to participate in the Plan (A119-120).

Whereas the statute expressly provides that the statutory services must not "supplant" those provided by the participating schools, the Original Plan provided instruction in reading, mathematics and English as a second language (A35), courses in which instruction was obviously provided in the participating religious schools. It may be that, without benefit of Title I teachers who, respondents will assume *arguendo*, are expert in bringing below-grade students up to grade, a religious school might have found that task difficult, but it could hardly in good conscience have evaded the responsibility or the effort. What the religious school teachers undoubtedly did prior to the Original Plan was to provide whatever extra assistance they could to their below-grade wards at the least expense to the latters' classmates.

In helping to bring below-grade students up to grade, moreover, the Original Plan did much more than to benefit those students. It greatly benefitted the entire religious school in that it not only relieved the school of an obligation it would have had with respect to those students, it also enabled the school to concentrate all of its resources on the rest of the student body.

Most importantly of all, the benefit the Original Plan thus conferred was by no means limited to the subjects of Title I instruction. The ability to read at a proper level and the ability to speak, read and write in English are the bedrock of learning so that the instruction received in those subjects aided the recipients in the instruction they received in every other subject in their school, religious as well as secular.

At this point it bears emphasizing that —

> . . . the secular education those [Roman Catholic parochial] schools provide goes hand in hand with the religious mission that is the only reason for their existence.

Lemon v. Kurzman, 403 U.S. 602, 616-17 (Brennan, J., concurring).

More recent, and perhaps even more direct authority is to be found in the following statement of Bishop Thomas V. Dailey in a pastoral letter issued to 1,500,000 parishioners in the Brooklyn Diocese, as quoted in *The New York Times* of December 1, 1993:

> The primary mission of the parochial schools remains "the teaching of the Catholic religion," the bishop said, responding to concerns that Catholic education has been losing its sense of purpose as nuns disappeared from the classrooms and the number of non-Catholic students increased.
>
> Each school will be mandated to develop a mission statement, which will include a statement of "Catholic Identity," Bishop Dailey said. That identity "is paramount," he said. *Without it, the Catholic school "has no reason for existence".*

(A110-111; respondents' italics).

A description of the Original Plan would not be complete without reference to a change in the Title I statute since *Aguilar* which will effect any re-institution of the Original Plan. That change allows Title I funds to be used by any participating school for "schoolwide programs" if —

> (i) the school serves an eligible school attendance area in which not less than 50 percent of the children are from low-income families; or

> (ii) no less that 50 percent of the children are from such families.

20 U.S.C. § 6314(a)(1)(B).

Under the foregoing provision, Title I funds may be used by a participating religious school to address the needs of the entire school. Some examples, provided by a representative of the Board of Education, are the hiring of a librarian, reducing class size, and buying computers. Declaration, dated June 8, 1995, of Michele I. Nowosad, Executive Director of the Division of Funded and External Programs of the Board of Education in *Committee for Public Education and Religious Liberty v. Secretary, United States Dept. of Education*, 88 Civ. 96 (JG) (E.D.N.Y.) (*"PEARL* case").

C. The Alternative Plan

After *Aguilar*, the Board of Education was given one year within which to develop what has become the Alternative Plan (Agostini App., p. 14a, *et seq.*). Events in the course of its development serve to illustrate one of the substantial differences noted above between the Title I statute and the program placed in operation thereunder.

The initial plan, proposed by the Chancellor and Board of Education for the school year 1986-87, was one in which 80% of the religious schools that had participated in the Original Plan invalidated in *Aguilar* were offered space in "matching" public schools ("Public School Sites") (A120). Each such Public School Site was no more than 10 minutes away, on foot or by bus, from the religious school to which it was matched[3]. The

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3. These features of the initial Alternative Plan are set forth in the Fourth Monthly Report of the Chancellor to Judge Neaher, p. 9, par. 26, a copy of which was annexed to the affirmation of the respondents' attorney in (Cont'd)

City proponents of this initial plan considered it to be, and it unquestionably was, the least expensive method of complying, or attempting to comply, with the determination of this Court in *Aguilar* and the least challengeable thereunder (*Id.*).

Only 52 of the 194 religious schools to which the offer of matching Public School Sites was made saw fit to accept the offer, and the initial Alternative Plan died aborning (A47). Until the City proponents thereafter developed an Alternative Plan that was acceptable to the religious schools, the students of those schools, regardless of their eligibility to receive Title I services, went without them. In the school year 1986-87, therefore, in which the initial Alternative Plan was supposed to have been placed in operation, the number of religious school students who received Title I services was approximately 50% less than the number who had received such services in the prior year (*Id.*).

The Alternative Plan ultimately developed and placed in operation has four components, the most important of which, and most expensive, entails the use of mobile instructional units ("MIUs"), buses fitted out as classrooms and driven to, or in the immediate vicinity of, the entrance to the participating religious schools (A57). Each MIU, and at one point there were 128 of them (A58), is leased at a cost of $106,934, including the cost of maintenance and the services of the driver (A87).

The Alternative Plan also makes use of locations leased by the Board of Education ("Leased Sites"). The number of such sites, however, are relatively few compared to the number of MIUs (A61-62), and the cost of maintaining them is relatively insignificant compared to the cost of the MIUs (A84).

(Cont'd)
opposition to petitioners' Rule 60(b)(5) motions, but which was omitted from that affirmation as reproduced in the appendix of the City petitioners (A120).

The current Plan still makes use of some Public School Sites, but they are also few in number (A48-49, and the cost of using them is nominal (A84)).

The remaining component of the Plan is computer-assisted instruction ("CAI"), which is extensive (A68), but respondents do not know how costly because the Board of Education has only disclosed the administrative costs attendant upon the use of the computers (A84). The CAI program, moreover, is heavily dependent on the MIUs because, as the Board acknowledges, it is preferable for students to have some face-to-face interaction with teachers rather than to work on computers only (A69).

D. The Alleged Financial Burdens of the Alternative Plan.

By regulation promulgated shortly after *Aguilar,* the Secretary, United States Department of Education required non-instructional expenses for Title I services off the premises of religious schools, principally the cost of MIUs, to be taken "off-the-top" of Title I funds allocated to any local education agency, including the Board of Education of New York City, before the expenditure of such funds for Title I services to public and religious school students (34 C.F.R. § 200.52(a)(2)). The unfairness of such regulation to public school students, who would thereunder participate in paying for the delivery of Title I services to religious school students, apparently prompted Congress and the New York State Legislature to appropriate funds for the specific purpose of paying for the expenses in question. 20 U.S.C. § 2727(d); Chapter 683 of the Laws of New York of 1986, § 9; Chapter 53 of the Laws of New York.

Those special appropriations have fallen off. The State appropriations ceased after the school year 1990-91 (A82). The Federal appropriations were reduced by approximately 50% for the current school year of 1996-97 (*Id.*). As a result, under the

"off-the-top" regulation, the Board of Education is now required to take a substantial portion of the cost of MIUs "off-the-top" of its allocation of Title I funds and thereby to reduce the amount of such funds available for Title I services to its only true wards, the public school students of New York City.

Under these circumstances, it seems clear that the alleged burdens of the Alternative Plan have been only recently imposed by one defendant in this case, the Federal government, represented by the Secretary of its Department of Education, on its fellow defendants, the City defendants and the Agostini defendants-intervenors. It seems equally clear that, but for such action on the part of the Federal defendant, there would have been no financial burden involved in the Alternative Plan about which the City defendants or the Agostini defendants-intervenors would have complained in their Rule 60(b)(5) motions in the District Court or in their pending petitions in this Court.

More importantly, petitioners are being less than candid with this Court about the alleged financial burdens of the Alternative Plan. Elsewhere — specifically, in the *PEARL* case — the City defendants minimized the alleged financial burdens of the Alternative Plan, as follows:

> Nevertheless, even under a statistical analysis, *the New York City Board's expenditures for post-**Aguilar** delivery methods have been far from "excessive" or "disproportionate."* . . . . This is especially clear when those expenditures are compared to the Board's total Chapter 1 expenditures, as they must be. . . . *For example, in the school year 1987-88, the Board spent a total of $197,657,498 under Chapter 1 (including federal and, state capital expenses). . . . In*

> *the same year, the Board spent $7,917,102 for the noninstructional costs of post-**Aguilar** delivery methods — approximately 4% of the total.*

Gov't Defs. Memo. in Support of Cross-Motion for Summary Judgment, pp. 60-61; respondents' italics.

E. The Alleged Administrative Burdens of the Alternative Plan.

It bears repeating that the key component of the Alternative Plan is the MIU, a bus equipped as a classroom which, when operating as such, is parked in the immediate vicinity of the entrance to a participating religious school (A57). To attend a Title I class in an MIU, therefore, all that the students at a participating religious school must do is to pass through the front door of the school, walk a few steps, under the watchful eye of the MIU driver who acts as a guard, and pass through the MIU door. They then enter a handsomely outfitted classroom which can accommodate as many as fifteen students in addition to the Title I teacher, and has a partition that separates the classroom from a conference room in which the Title I counselor can perform his/her services or the Title I teacher can confer with his/her religious school counterpart or with a parent or parents of one of the students (A54).

Under such circumstances, it is more than questionable that it takes substantially more time for the students or teachers of a participating religious school to arrive at a Title I classroom in an MIU stationed immediately outside the door of the school building, or that it is substantially more inconvenient for them to participate in Title I activities in the MIU, than it was for them to arrive at a Title I class in a separate, and perhaps more distant, classroom inside the school building and to participate in Title I activities therein. In any event, it is more than

questionable that the time consumed in reaching the MIU is more than the ten minutes normally allotted as a recess between classes in any school.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS COME BEFORE THIS COURT THROUGH A PROCEDURE, APPROVED BY THE COURTS BELOW, THAT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CAUSE THIS COURT TO DENY THEIR PETITION AS AN EXERCISE OF THE COURT'S SUPERVISORY POWER.

This reason for denying the writ parallels the reason for respondents' seeking, by cross-petition, to have this Court review and renounce the procedure, purportedly under Rule 60(b)(5), followed by petitioners and approved by the courts below in this case. For their argument in support of this reason, therefore, respondents respectfully refer this Court to their cross-petition.

II.

THERE IS NO COMPELLING REASON FOR GRANTING THE WRIT.

The rules of this Court state that a petition for a writ of certiorari "will be granted only for compelling reasons." Sup. Ct. R. 10. It has, in particular, been noted that the Court reviews issues that are "beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955); 13 Moore's Federal Practice, § 810.21 at SC10-23 (2d ed. 1995).

It is respectfully submitted that the petitions under consideration present a single issue that is both "academic" and "episodic."

With respect to the academic nature of the issue presented by petitioners, respondents urge this Court to look once again at the single question presented by petitioners: "Whether the Court should reconsider its holding in *Aguilar v. Felton*. . . ." (City Pet., p. i); "Whether this Court should overrule its decision in *Aguilar v. Felton* . . ." (Agostini Pet., p. i). Such a question might be other than academic if it arose as a subsidiary question in a case in which there was a real dispute that depended upon the determination in *Aguilar*. Respondents respectfully submit that there is no such dispute before this Court at this time.

As set forth above, there is in place in New York City, a program pursuant to which Title I remedial instruction and counseling are being provided to students attending those religious schools in the City that have elected to participate in the program. It is now claimed, as the basis for this proceeding, that a less costly and more efficient program might be placed in operation if this Court were to hold that it would be permissible to conduct the program on the premises of the participating religious schools. There is, however, no real dispute between petitioners and respondents on comparative cost or efficiency *per se*. That has virtually been provoked by petitioners in order to present the question of the constitutionality of the on-premises program to this Court for a second time after an interim of eleven years.

Additionally, respondents respectfully question whether cost or efficiency should have any bearing on the issue of whether or not conduct of a government agency is constitutionally permissible. When this case was first before the Court of Appeals, which unanimously held the on-premises program to be invalid, that court, speaking through Judge Friendly, anticipated that an off-premises program would be

more costly and less efficient, and then held, on the basis of the precedents in this Court, that any such consideration was immaterial to the constitutional question in the case. 739 F.2d at 71-72.

The current unavailability of funds to cover the costs of MIUs without having those funds taken "off-the-top" also demonstrates the "episodic" nature of the issue petitioners present in this proceeding in their request for "relief' from the determination of this Court in *Aguilar.* For most of the eleven years that have elapsed since that determination, there have been sufficient special funds for that purpose. We are told that such funds might be "substantially reduced" for this school year (A82-83). For all anyone can tell, however, they may be available for the next school year, especially in light of the fact that the leaders of both major political parties have recently and vigorously championed an increase in the appropriation of Federal funds for educational purposes.

Lastly, but not least importantly, there is at least a serious question concerning the alleged costliness and inefficiency of the off-premises program when compared to the on-premises program. As noted above, the City petitioners have emphatically minimized the alleged costliness of the present off-premises program *(see,* pp. 10-11 above). As also noted above, their claim concerning the alleged inefficiency of the program relies heavily on the more than questionable inconvenience of using as classrooms MIUs parked outside the door of the participating religious schools instead of classrooms inside that door.

In sum, with a program in place that provides Title I services to the eligible students of participating religious schools, which has been in place for eleven years, and the features of which have withstood challenge concerning their constitutional validity in four Courts of Appeal and one District Court, it is respectfully submitted that there is no compelling reason for this Court to

grant the writ petitioners seek in order to consider or reconsider the constitutional validity of another program that is not truly in dispute and presents issues that are weighty, not easily resolved on any record, and not properly resolved on the existing record in this case.

III.

THE ISSUES THAT SHOULD BE RAISED AND RESOLVED IN ANY RECONSIDERATION OF *AGUILAR* AND THE PROGRAM THERE IN QUESTION INVOLVE CONSIDERABLY MORE THAN THE DOCTRINE OF "EXCESSIVE ENTANGLEMENT." THEY MAY NOT PROPERLY BE RESOLVED BY REFERENCE TO THAT DOCTRINE ALONE OR BY REFERENCE TO CASES OF AN ENTIRELY DIFFERENT FACT PATTERN, IF INDEED THEY MAY BE PROPERLY RESOLVED ON THE RECORD IN THIS CASE.

As indicated elsewhere, petitioners, principally the Agostini petitioners in this instance, are emphatic in stating that "[e]xcessive entanglement was the only ground for the decision in *Aguilar*" (Agostini Pet., p. 22). The same petitioners also assert that every part of the three-part test in *Lemon v. Kurzman,* 403 U.S. 602 (1971) has been "abandoned" (*Id.*). Respondents do not agree with either proposition, but we will not waste time, effort or space responding thereto at any length.

Suffice it to say in response to the first proposition that it is misleading, if not inaccurate. It may be that "excessive entanglement" might appear to be the only *stated* ground for the determination in *Aguilar,* but respondents respectfully submit that it is not the only ground on which that determination may be upheld, and it is in all likelihood the only stated ground because that ground was in turn based on the clear precedent in

Meek, a precedent acknowledged even by the dissenters in *Aguilar* (*see,* 473 U.S. at 427, O'Connor, J., dissenting).

Suffice it to say here in response to the proposition that the *Lemon* test or tests have been abandoned that such may well be irrelevant for present purposes, if not inaccurate. There will always have to be some test or tests for determining whether conduct violates the Establishment Clause, presumably based, pursuant to the common law tradition, on a precedent or chain of precedents in the form of decisions in prior cases involving a similar fact pattern.

As indicated at the beginning of this brief, respondents believe that the closest and controlling precedent in any reconsideration of *Aguilar* that might be undertaken by this Court is the determination of the Court in *Ball,* the case that was heard and decided at the same time as *Aguilar.* As the Court, speaking through Justice Brennan, noted in *Aguilar,* "The New York City programs challenged in this case are very similar to the programs we examined in *Ball.*" 473 U.S. at 402.

This Court found it necessary to distinguish *Ball* in *Zobrest v. Catalina Foothills School District,* 509 U.S. 1 (1993). In doing so, the Court noted that the programs in *Ball* "in effect subsidize[d] the religious functions of the parochial school by taking over a substantial portion of their responsibility for teaching secular subjects." 509 U.S. at 12, quoting *verbatim* from Justice Brennan's opinion for the Court in *Ball.* 473 U.S. at 397. The Court also noted in *Zobrest* that the funding of the programs in *Ball,* in this instance together with the funding of programs in *Meek,* constituted "*direct grants of government aid* that relieved sectarian schools of costs they otherwise would have borne in educating their students." 509 U.S. at 12; respondents' italics.

On the other hand, as the Agostini petitioners point out, this Court noted in *Zobrest* that the assignment therein by a public school district of a sign-language interpreter to a *single* deaf-mute student attending a religious school was constitutionally permissible because it provided the school with only "an attenuated financial benefit." 509 U.S. at 12.

Because of the Court's comments in *Zobrest,* and because the Agostini petitioners rely heavily on that case as one in which the Court "upheld the delivery of generally available services to parochial school students" (Agostini Pet., p. 16), presumably comparable to the delivery of services under the Original (Title I) Plan in *Aguilar,* respondents believe a comparison of the services in *Aguilar* with those in *Ball* and *Zobrest* is in order.

As respondents have noted above, the Title I program in *Aguilar,* by providing instruction in reading, mathematics and English clearly "[took] over a substantial portion of [the participating religious school's] responsibility of teaching secular subjects." As also noted above, there is scant validity in the argument (which petitioners have never supported with other than references to the wording of the Title I statute and conclusory statements repeating such wording) that, presumably because of the remedial nature of the instruction in *Aguilar,* it did not "supplant" any instruction the religious school had previously provided. Any such argument hardly serves to overcome the fact that the school previously had, and had undoubtedly previously assumed, the responsibility, as best it could, of bringing its below-grade students up to grade in such basic subjects as reading, mathematics and English. By any objective standard, therefore, the Title I program in *Aguilar* far more closely resembles the programs in *Ball* than it does the provision of a sign-language interpreter to a single deaf-mute student in *Zobrest.*

At this point, it bears noting that, despite the fact that the record in *Aguilar* was developed by the plaintiffs on the strength of *Meek* and the doctrine of "excessive entanglement," Justice Powell, who hardly qualified as a doctrinaire supporter of the principle of separation of church and state, and whose vote in *Aguilar* was hardly assured until cast (but in the opinion of all concerned was decisive), saw enough in the record to state the following:

> As has been discussed thoroughly in *Ball, ante,* at 392-397, with respect to the Grand Rapids programs, *the type of aid provided in New York by the Title I program amounts to a state subsidy of the parochial schools by relieving those schools of the duty to provide the remedial and supplemental education their children require.*

473 U.S. at 402. Powell, J., concurring; respondents' italics.

The Agostini petitioners venture to distinguish the programs in *Ball* from the program in *Aguilar* by noting that the programs in *Ball* were "provided to *all* of the students in the nonpublic schools" and that "[a]pproximately ten percent of any given nonpublic school student's time during the academic year would consist of [the state-sponsored instruction]" (Agostini Pet., p. 16, n. 11; petitioners' italics). Even if it is assumed that this quantification provides a meaningful distinction, it bears repeating that under any re-instituted Title I program on the premises of religious schools — which is what petitioners are seeking in this proceeding — Title I funds will in fact be available for the benefit of *all* of the students of the religious school in the form of "schoolwide programs." With respect to the student hours spent in the Title I program in *Aguilar,* the record in this case, for the reason respondents have repeatedly indicated, is

blank, and it is but another reason why that record is inadequate for any reconsideration of *Aguilar* at this time.

Before leaving *Ball,* respondents respectfully call this Court's attention to another grounds for the determination of the Court in that case which is particularly applicable to *Aguilar* — *i.e.,* "the symbolic union of church and state inherent in the provision of secular, state-provided instruction in the religious school buildings [which] threatens to convey a message of state support for religion to students and the general public." 473 U.S. at 397.

In his opinion on behalf of the Court in *Ball,* Justice Brennan provided the following as a prime example of this symbolic union:

> Under the City's plan public school teachers are, so far as appearance is concerned, a regular adjunct of the religious school. They pace the same halls, use the same classrooms in the same building, teach the same students, and confer with the teachers hired by the religious schools, many of them members of religious orders. The religious school appears to the public as a joint enterprise staffed with some teachers paid by its religious sponsor and others by the public.

473 U.S. at 392.

The significant part of the foregoing passage for present purposes is that it is a description, not of the programs in *Ball,* but of the Title I program in *Aguilar,* taken from the opinion of Judge Friendly on behalf of the unanimous Court of Appeals when this case was first in that Court. 787 F.2d at 67-68.

The one case other than *Zobrest* on which petitioners rely heavily, *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510 (1966) is wholly inapposite on its facts. *Rosenberger* did not involve anything resembling the type of programs in *Ball* and *Aguilar.* Rather, it involved the use of a fund, created by a state university to make payments for the printing costs of publications of student groups, in order to make a payment for the printing costs of a publication of a student group organized to promote a particular religious belief.

Rosenberger was decided on the ground that the denial of funding to that particular student group was a denial of the free speech guarantee of the First Amendment which was not compelled by the Establishment Clause. In so holding, the Court expressly distinguished direct money payments to sectarian institutions (115 S. Ct. 2523) (to which this Court in *Zobrest* had likened the funding of the programs in *Ball*), and there was no question of the subsidization of the religious mission of sectarian schools by the taking over of their responsibility for teaching secular subjects.

Petitioners extract from the opinion of this Court in *Rosenberger* and in the few other cases they cite the "neutrality concept" which they then seek to apply to the Title I program in *Aguilar,* as if that concept excuses the subsidization of the religious mission of sectarian schools or the effect of the appearance of a joint enterprise of church and state on the students of those schools and the general public. Any such application of the "neutrality concept," however, would permit the circumvention of the line of cases cited in *Rosenberger* as prohibiting direct payments to religious schools simply by providing for similar payments to be made to nonreligious schools. 115 S. Ct. 2523.

The "neutrality" on which petitioners rely to save the

program in this case might appear on the face of the Title I *statute.* It did not exist in the Title I *program* that was in operation with respect to "non-public" schools prior to *Aguilar.* As noted above, no less than 99.97% of the students in the schools that participated in that program attended religious schools.[4] It bears repeating, moreover, that, unlike the student of a religious school who is aided by a policeman or fireman, or who boards a public bus free of charge on his/her own, or who obtains the aid of a sign-language interpreter or other assistant on his/her parents' application, the religious school students in the Title I program in operation prior to *Aguilar* received Title I services only if their school elected to participate in the program, and even then only through arrangements made by the school. In the latter situation, it is inconceivable that the students receiving Title I services did not see them as coming through the good auspices of the religious school or, as unfortunately for present purposes, through a joint effort of the religious school and some government agency.

Before concluding this point, respondents respectfully point out that, because of the lack of an adequate record, we have attempted to do little more than to establish that there are creditable grounds other than, or in addition to, the doctrine of "excessive entanglement" on the basis of which this Court might let its determination in *Aguilar* stand. If, therefore, the Court wishes to reconsider that determination in this proceeding, we respectfully repeat the request made in our cross-petition that the Court remand this case to the District Court for a plenary hearing in which we will have the opportunity to develop an adequate record in support of those additional grounds, with leave to petitioners to renew their petition for a writ of certiorari

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4. In any event, the analysis of this Court of a statute "does not end with the text of the statute. . . ." *Kiryas Joel*, 114 S. Ct. at 2489.

upon the completion of that hearing and without further decision of the District Court or the Court of Appeals.

CONCLUSION

It is respectfully submitted that the petitions for a writ of certiorari should be denied.

Alternatively, if this Court wishes to reconsider its prior determination in this case in this proceeding, it is respectfully submitted that the Court should remand the case to the District Court with instructions to conduct a plenary hearing, including full discovery and any trial necessary to resolve questions of fact, concerning the issues raised by allowing Title I services to be re-instituted on the premises of the religious schools of New York City, with leave to petitioners to renew their petitions for a writ of certiorari in this Court upon the completion of such proceeding without further decision of the District Court or the Court of Appeals. It is further respectfully submitted that the instructions to the District Court should provide that, at the commencement of the proceeding therein, the Board of Education shall present the Title I program or plan it intends to institute on the premises of the religious schools should this Court permit it to do so.

Respectfully submitted,

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